

ESTTA Tracking number: **ESTTA576152**Filing date: **12/12/2013**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Monteverde Foods		
Entity	Corporation	Citizenship	California
Address	2508 El Camino Real, Suite E2 Carlsbad, CA 92008-1203 UNITED STATES		

Attorney information	Charles F. Reidelbach, Jr., Esq. Higgs Fletcher & Mack LLP 401 West A Street, Suite 2600 San Diego, CA 92101 UNITED STATES trademarks@higgslaw.com Phone:619-236-1551
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Registration Subject to Cancellation

Registration No	3789917	Registration date	05/18/2010
Registrant	Spirito Brothers, LLC 3411 Silverside Rd., Rodney Bldg. #10 Wilmington, DE 19810 GERMANY		

Goods/Services Subject to CancellationClass 030. First Use: 2009/09/25 First Use In Commerce: 2009/10/01
All goods and services in the class are cancelled, namely: Pasta sauce**Grounds for Cancellation**

Abandonment	Trademark Act section 14
Priority and likelihood of confusion	Trademark Act section 2(d)

Marks Cited by Petitioner as Basis for Cancellation

U.S. Application No.	86141785	Application Date	
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	NONE		
Design Mark			
Description of Mark	NONE		
Goods/Services			

U.S. Application No.	86141776	Application Date	
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	NONE		
Design Mark			
Description of Mark	NONE		
Goods/Services			

Attachments	DOCS- #1162894-v2-MONTEVERDE_FOODS_Petition_for_Cancellation_of_Spirito_Br others__LLC_mark.pdf(99713 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/charlesfreidelbachjr/
Name	Charles F. Reidelbach, Jr., Esq.
Date	12/12/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

Monteverde Foods

Petitioner,

-against-

Spirito Brothers, LLC

Registrant.

Cancellation No.:

Regarding Reg. No. 3789917

PETITION FOR CANCELLATION

Monteverde Foods (“Petitioner”), a California corporation located at 2508 El Camino Real, Suite E2, Carlsbad, California 92008, believes that it is being damaged by Registration No. 3789917 and hereby petitions to cancel same as to all listed goods, on the following grounds:

1. Upon information and belief, Registrant Spirito Brothers, LLC (“Registrant”), a Delaware limited liability company, and located at 3411 Silverside Rd. Rodney Bldg. #10, Wilmington, Delaware 19810, is the owner of United States Trademark Registration No. 3789917 for SPIRITO BROTHERS TOMATO SAUCE SINCE 1933 and Design for use in connection with “pasta sauce” in International Class 030 (“the ‘917 Registration”).
2. Petitioner is the owner of United States Trademark Application No. 86141785 for SPIRITO’S in International Classes 029 for “prepared meals consisting primarily of meat, fish, poultry, or vegetables” and International Class 030 for “salad dressings; sauces.” Petitioner is also the owner United States Trademark Application No. 86141776 for SPIRITO’S ITALIAN DINER in International Class 043 for “restaurant and catering services.” Petitioner hereby gives notice that, in accordance with Trademark Rule 2.122(d), it will rely on said applications as evidence on its behalf in this

proceeding, and status copies thereof will be introduced into evidence during Petitioner's testimony period.

3. Because the described goods of the '917 Registration are the same, and incorporates the entirety of, Petitioner's SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks, the '917 Registration is likely to cause confusion and is likely to deceive purchasers as to the source or sponsorship of such goods.

4. Petitioner's SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks are inherently distinctive as used in connection with its respective goods and services.

5. Petitioner's use of its SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks beginning at least as early as January 24, 2009 predates Registrant's alleged first use date of September 25, 2009 and establishes Petitioner's priority.

6. Petitioner's SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks have been used continuously in connection with such goods and services since at least as early as January 24, 2009. As a result of Petitioner's widespread use of its trademarks in connection with all of its goods and services, Petitioner's SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks have acquired great distinctiveness and extensive goodwill, and are well known and recognized by consumers and the trade as identifying Petitioner's goods.

7. Registrant has never used its trademark in its '917 Registration in the United States in conjunction with pasta sauce in interstate commerce. Even if Registrant had used its mark at the time of registration, Registrant discontinued such use in the United States for a period of three years or more, and thus is presumed to have abandoned its trademark rights under 15 U.S.C. § 1127.

8. If Registrant is permitted to continue to maintain its '917 Registration, it casts a cloud upon Petitioner's own right to continue to use, develop and to expand the use of its SPIRITO'S and SPIRITO'S ITALIAN DINER trademarks in the United States. Such registration is thus a source of damage and injury to the Petitioner.

WHEREFORE, Petitioner believes that it will be damaged by Registration No. 3789917 and prays that this Petition for Cancellation be sustained in favor of Petitioner, that judgment be entered against Registrant and that U.S. Trademark Registration No. 3789917 be canceled.

DATED: December 12, 2013

HIGGS, FLETCHER & MACK LLP



By: _____

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California State Bar No. 201679
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITION FOR CANCELLATION was served on December 12, 2013 to the following parties:

Attorney of record for Registrant Spirito Brothers, LLC (via Federal Express):

Lyndon Hong
Chamberlin Keaster & Brockman LLP
16000 Ventura Blvd Ste 700
Encino, CA 91436-2758

Registrant (via Federal Express):

Spirito Brothers, LLC
3411 Silverside Rd., Rodney Bldg. #10
Wilmington, Delaware 19810

Dated: December 12, 2013

By:

A handwritten signature in black ink, appearing to read "Meilani N. Rivera", written over a horizontal line.

Meilani N. Rivera, Paralegal